

3/14/05 - (6)

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement ("Agreement") is made this ____ day of March, 2005 by, between and among **Woodlands at Laurel Hill, LLC**, a Massachusetts limited liability company with a principal place of business at 676 Elm Street, Suite 300, Concord, MA 01742, on behalf of itself its successors, assigns and nominees ("Woodlands"); and the **Town of Acton** ("Town"), acting by and through its Board of Selectmen, with an address of 472 Main Street, Acton, Massachusetts 01720 ("Board of Selectmen").

WHEREAS, on or about October 7, 2004, Woodlands filed applications for comprehensive permits under M.G.L. c. 40B, §§ 20-23, with the Acton Zoning Board of Appeals ("Acton ZBA") and the Westford Zoning Board of Appeals ("Westford ZBA") for a total of 352 residential rental units (296 in Acton and 56 in Westford, hereinafter referred to as the "Project"), on approximately 46 acres of land located off of Durkee Lane and Nagog Park in Acton and Westford hereinafter referred to as the "Property";

WHEREAS the Acton ZBA opened a public hearing on the Acton portion of the Project on November 4, 2004, and the Westford ZBA opened a public hearing on the Westford portion of the Project on November 17, 2004.

WHEREAS after the initial public hearing, the Acton Board of Selectmen and Woodlands have negotiated in an effort to arrive at a consensus as to the scale of the project and certain payments from the project to be used for police, fire and emergency public safety infrastructure improvements for North Acton.

WHEREAS as a result of those negotiations, the Acton Board of Selectmen and Woodlands have agreed to recommend to the Acton Board of Appeals, the Acton Conservation

Commission, and the Acton Planning Board approval of a revised project consisting, in Acton, of 296 residential rental units and 64 "for sale" townhouse units, conditioned on the terms set forth herein.

WHEREAS, the Westford ZBA has requested that the Project be revised so as to increase the number of units in Westford to 84 (the revisions as aforesaid to the Project in both Acton and Westford hereinafter referred to as "Revised Project").

WHEREAS, Woodlands intends to file amended applications for comprehensive permits under M.G.L. c. 40B, §§20-23, with the Acton ZBA and the Westford ZBA for the Revised Project.

WHEREAS, subject to the terms and conditions set forth in this Agreement, the Board of Selectmen is willing to support approval of the Revised Project.

NOW THEREFORE, for adequate consideration, the receipt and sufficiency of which are hereby acknowledged Woodlands and the Board of Selectmen agree as follows:

1. Amended ZBA Applications for Revised Project

On or before March 8, 2005, Woodlands shall deliver to the Acton ZBA a request to amend its pending application for a comprehensive permit to change the Project to the Revised Project; provided, however, that said amendment shall not in any way be construed as a waiver or withdrawal of the original application for comprehensive permit filed with the Acton ZBA. Woodlands shall submit to the Acton ZBA (a) sufficient information on the Revised Project to conform to the jurisdictional application requirements for the comprehensive permit, (b) an identification of all necessary waivers from the Acton ZBA for the Revised Project, and (c) any

additional application fees required for additional units in the Revised Project compared to the original Project.

2. Proposed Conditions for Comprehensive Permit for Revised Project

Woodlands and the Board of Selectmen agree to request expedited approval by the Acton ZBA for a comprehensive permit for the Revised Project. They further agree to recommend that conditions be included in the comprehensive permit for the Revised Project to be issued by the Acton ZBA to be in accordance with this Agreement when (and if) the Revised Project is approved by the Acton ZBA ("Proposed Conditions"). Before the close of the Acton ZBA's public hearing, Woodlands and the Board of Selectmen will use their best efforts to agree on a set of Proposed Conditions which they shall submit to the Acton ZBA. Woodlands and the Board of Selectmen understand and agree that, based on input at the public hearing on the Revised Project and based on the Acton ZBA's own independent view of the Revised Project, the Revised Project may or may not be approved by the ZBA and the Proposed Conditions may be adopted, amended or rejected by the Acton ZBA.

3. Special Permit for Senior Residence Development

In the event that the Acton ZBA issues on or before August 15, 2005, a comprehensive permit for the Revised Project, including the construction of townhouse condominium units on that portion of the Property in Acton designated as Lot 4, Woodlands shall forthwith apply to the Acton Planning Board for a special permit pursuant to Section 9B of the Acton Zoning Bylaw for the development and construction of a Senior Residence development with 10% affordability in lieu of the approved 40B development with 25% affordability on that portion of the Property in Acton designated as Lot 4. The Board of Selectmen agrees to support the expedited approval with conditions by the Acton Planning Board of a special permit for the Senior Residence

development in lieu of the approved 40B development on that portion of the Property in Acton designated as Lot 4. Woodlands and the Board of Selectmen understand and agree that, based on input at the public hearing on the Senior Residence development and based on the Acton Planning Board's own view of the Senior Residence development, the Planning Board may or may not approve the requested Special Permit.

4. Payments to The Town of Acton

Woodlands agrees that it shall pay to the Town of Acton in accordance with G.L. c. 44, §53A, the following amounts within the following time frames:

(a) Approval of Chapter 40B Townhouse Condominium Units

In the event that the Acton ZBA issues on or before August 15, 2005, a comprehensive permit for the Revised Project, including the construction of townhouse condominium units on that portion of the Property in Acton designated as Lot 4, Woodlands shall pay to the Town of Acton the sum of five hundred thousand dollars (\$500,000) by certified, cashier's, treasurer's or bank check, or wire transfer, prior to issuance of any building permit for the Revised Project in Acton; and the additional sum of ten thousand five hundred dollars (\$10,500) per unit upon the closing of the first sale of each market rate condominium unit constructed and sold pursuant to the comprehensive permit on that portion of the Property in Acton designated as Lot 4, payable by certified, cashier's, treasurer's or bank check, or wire transfer; said obligation to pay shall constitute a separate lien of \$10,500 each on each market rate unit and said lien shall be released by the Town's Treasurer for a given market rate unit upon payment to the Town of the \$10,500 amount for that unit. (By way of illustration, if there are 48 market rate condominium units and 16 affordable condominium units approved on that portion of the Property, the Town shall be

paid a total of \$10,500 times 48 payable in equal \$10,500 installments as each unit's first sale closes.)

(b) Approval by Acton Planning Board of a Special Permit for Senior Residence Development

In the event that the Acton ZBA issues on or before August 15, 2005, a comprehensive permit for the Revised Project including the construction of townhouse condominium units on that portion of the Property in Acton designated as Lot 4, and in the event Woodlands or its successor, assign, designee, nominee or affiliate applies for and obtains on or before January 15, 2006, a special permit from the Acton Planning Board for the development and construction of a Senior Residence development in lieu of a 40B development on that portion of the Property in Acton designated as Lot 4, Woodlands shall pay to the Town of Acton the sum of five hundred thousand dollars (\$500,000) by certified, cashier's, treasurer's or bank check, or wire transfer, prior to issuance of any building permit for the Revised Project in Acton,¹ and the additional sum of twenty-four thousand two hundred twenty-eight dollars (\$24,228) per unit for each market rate Senior Residence unit constructed and sold pursuant to the special permit payable upon the closing of the first sale of each such market rate Senior Residence unit on that portion of the Property in Acton designated as Lot 4, payable by certified, cashier's, treasurer's or bank check, or wire transfer; said obligation to pay shall constitute a separate lien of \$24,228 each on each market rate unit and said lien shall be released by the Town's Treasurer for a given market rate unit upon payment to the Town of the \$24,228 amount for that unit. (By way of illustration, if there are 57 market rate Senior Residence units and 7 affordable Senior Residence units

¹ If the sum of \$500,000 has previously been paid by Woodlands to the Town in accordance with paragraph 4(a) hereof, that payment shall be deemed to satisfy Woodland's obligation to pay \$500,000 under the first bullet of paragraph 4(b), it being understood and agreed that the \$500,000 payment shall occur only once.

approved on that portion of the Property, the Town shall be paid a total of \$24,228 times 57 in equal \$24,228 installments as each unit's first sale closes.)

(c) Separate Account

In accordance with G.L. c. 44, § 53A, all such payments made pursuant to this paragraph 4 shall be deposited with the Town treasurer and held as a separate account and may be expended by the Board of Selectmen, without further appropriation, toward police, fire and emergency public safety infrastructure improvements for North Acton. Interest on all such funds shall remain with and shall become a part of the same account and may be expended by the Board of Selectmen, without further appropriation, for the same purposes.

(d) Enforcement

In the event that Woodlands or the Town defaults on any obligation under this Agreement, the other party hereto shall have the right to enforce such obligations in an action brought in a court of competent jurisdiction.

5. Construction of the Revised Project

Woodlands, in its absolute and sole discretion, may decide not to proceed with any portion of the Revised Project. However, if Woodlands or its successors, assigns and/or nominees proceeds with the construction of the rental portion of the Revised Project, it shall also construct, complete, and market "for sale" the townhouse units on Lot 4 (including the Senior Residence development if approved). If Woodlands constructs the Revised Project it shall phase construction in such a way as is reasonably practical that the "for sale" units in Acton are constructed before or at the same time as the rental units in Acton, it being the intent of the parties that the "for sale" units shall be completed and offered for sale as soon as reasonably possible in the construction sequence.

6. No Appeals

(a) If the Acton ZBA issues a comprehensive permit for the Revised Project on or before August 15, 2005, which includes the Proposed Conditions and such other conditions that in Woodland's absolute and sole discretion are acceptable (i) Woodlands shall not appeal the comprehensive permit, and (ii) the Board of Selectmen shall not permit any town board or official to appeal the comprehensive permit or any other decision made by any other governmental permitting authority approving the development of the Revised Project. In exercising its discretion under this paragraph, Woodlands agrees not to appeal a comprehensive permit for the Revised Project if such other conditions would not delay, alter the design of, or increase the cost of construction or operation of the Revised Project.

(b) If the Planning Board issues a special permit for the development and construction of a Senior Residence development in lieu of a 40B development on that portion of the Property in Acton designated as Lot 4 on or before January 15, 2006, with conditions that in Woodland's absolute and sole discretion are acceptable (i) Woodlands shall not appeal the special permit, and (ii) the Board of Selectmen shall not permit any town board or official to appeal the special permit or any other decision made by any other governmental permitting authority approving the Senior Residence development. In exercising its discretion under this paragraph, Woodlands agrees not to appeal a special permit for a Senior Residence development in lieu of a 40B development on that portion of the Property in Acton designated as Lot 4 for the Revised Project if such other conditions would not delay, alter the design of, or increase the cost of construction or operation of the Revised Project including the Senior Residence component.

(c) If the Acton ZBA denies a comprehensive permit for the Revised Project, or

approves the Revised Project with conditions that are not in Woodlands absolute and sole discretion acceptable under paragraph 6(a), Woodlands may appeal the comprehensive permit to the Housing Appeals Committee; however, Woodlands shall forthwith dismiss that appeal in the event that the Town within three months of the appeal agrees to a settlement that would result in approval of the Revised Project with the Proposed Conditions and such other conditions that in Woodland's absolute and sole discretion are acceptable.

7. Master Deeds and Mortgages

This Agreement shall be binding on the parties hereto and their respective heirs, executors, administrators, members, successors, assigns, nominees, affiliates and designees.

Upon the closing on the purchase by Woodlands or its successor, assign, designee, nominee or affiliate of any portion of the Property comprising the Revised Project site in Acton, Woodlands shall forthwith record this Agreement (or a mutually acceptable Notice of this Agreement) with its deed in the Middlesex South District Registry of Deeds in the chain of title for the Property in Acton. Woodlands shall provide a registry-stamped copy of the recorded Agreement (or Notice) to the Board of Selectmen within five days of its being recorded. In the event Woodlands fails to record this Agreement (or Notice), the Board of Selectmen may do so. This Agreement shall run with the land comprising the Revised Project site in Acton

This Agreement shall be referenced in the Master Deed for any condominiums within the Revised Project and any Senior Residence development on the Property.

If the Property is or becomes encumbered by any deed or instrument to secure a debt, mortgage or other security interest in all or any portion of the Property in Acton, Woodlands shall use best efforts to provide promptly to the Town a mutually agreeable Subordination, Non-Disturbance and Attornment Agreement pursuant to which this Agreement shall survive the

foreclosure of any such debt, mortgage or other security interest, it being the express intention of the parties hereto that if the Acton portion of the Property is developed pursuant to a comprehensive permit from the Acton ZBA and/or a special permit for a Senior Residence development from the Acton Planning Board, the Town of Acton shall be entitled to receive the payments set forth in paragraph 4 hereof from the person or entity developing the Property in accordance with the Revised Project.

8. Authority

Each individual signing this Agreement warrants and represents that he or they are authorized to do so. Woodlands shall execute and append hereto a Certificate in a form mutually acceptable to Town Counsel and Woodlands counsel attesting to the authority of its signatory hereto.

9. No Waiver

Failure of any party to this Agreement to avail itself or any of the terms, covenants and conditions of this Agreement for a period of time or at any time or times, shall not be construed or deemed to be a waiver of any of its rights hereunder.

10. Amendments

No change, amendment modification, cancellation or termination of this Agreement hereof, or any part of this Agreement shall be valid unless all parties to this Agreement consent thereto in writing.

11. Counterparts

This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one Agreement which shall be binding on all of the parties hereto.

12. Entire Agreement

This Agreement embodies the entire Agreement between the parties hereto with respect to the subject matter hereof and supersedes all prior Agreements and understandings relating to such subject matter.

13. Termination

This Agreement may be terminated by Woodlands by written notice to the Board of Selectmen (in which case this Agreement shall be of no force and effect and none of the parties hereto may directly or indirectly take any actions to enforce or rely on any of the provisions hereof), if:

(a) A comprehensive permit for the Revised Project in Westford is not issued by the Westford ZBA on or before January 15, 2006; provided, however, that if Woodlands elects to terminate this Agreement for this reason, Woodlands shall with its termination notice surrender to the Board of Selectmen any comprehensive permit for the Revised Project in Acton and any special permit for the Senior Residence development on Lot 4 in Acton and said permits shall be null and void and of no force and effect unless and until Woodlands shall have reinstated this Agreement with the Town of Acton;

(b) Woodlands appeals the comprehensive permit issued by the Westford ZBA to the Housing Appeals Committee; provided, however, that if Woodlands elects to terminate this Agreement for this reason, Woodlands shall with its termination notice surrender to the Board of Selectmen any comprehensive permit for the Revised Project in Acton and any special permit for the Senior Residence development on Lot 4 in Acton and said permits shall be null and void and of no force and effect unless and until Woodlands shall have reinstated this Agreement with the Town of Acton;

(c) A comprehensive permit for the Revised Project in Action is not issued by the Acton ZBA on or before August 15, 2005;

(d) Woodlands appeals the comprehensive permit issued by the Acton ZBA to the Housing Appeals Committee and said appeal is not resolved under paragraph 6(c) hereof;

(e) An appeal of the comprehensive permit for the Revised Project issued by the Acton ZBA, Westford ZBA or of any other governmental permit or approval for the Revised Project is commenced by any party other than Woodlands which appeal prevents construction of the Revised Project commencing on or before December 31, 2006 provided, however, both Woodlands and Town agree, at each's sole cost and expense, to vigorously defend any such appeal and to agree to attempt to mediate any such appeal before a third-party mediator; or

(f) Woodlands withdraws the application for the Revised Project for consideration by the Acton ZBA and the Westford ZBA.

14. Provision of Emergency Services to Westford

Subject to applicable requirements of municipal law, the Board of Selectmen is willing for the Town to provide emergency services (to wit; police, fire and ambulance) to the Westford portion of the Revised Project on terms acceptable to the Town including without limitation terms assuring that the Town of Acton is reasonably reimbursed for those services.

15. No Waiver of Original Application

Nothing contained in this Agreement or any other actions by Woodlands shall be considered a waiver or withdrawal of any type or kind of the original applications for comprehensive permits filed with the Acton ZBA for 296 units and the Westford ZBA for 56 units.

16. Notices

All notices to be given pursuant to this Agreement shall be in writing and shall be deemed given when delivered by hand or when mailed by certified or registered mail, postage prepaid, return receipt requested, to the parties hereto at the addresses set forth below, or to such other place as a party (or its successor, assign, nominee, affiliate and designee) may from time to time designate by written notice:

Woodlands:

David E. Hale, Manager
Woodlands at Laurel Hill, LLC
676 Elm Street, Suite 300
Concord, MA 01742

Town:

Board of Selectmen
c/o Town Manager
Town of Acton
472 Main Street
Acton, Massachusetts 01720

17. Governing Law

This Agreement and the rights and obligations of the parties hereunder shall in all respects be construed as a Massachusetts contract and shall be governed by, and construed and enforced in accordance with, the laws of the Commonwealth of Massachusetts. The parties hereby irrevocably submit to the jurisdiction of the Middlesex Superior Court over any suit,

action or proceeding arising out of or relating to this Agreement.

Duly authorized and executed as a sealed instrument as of the date first written above.

WOODLANDS AT LAUREL HILL, LLC

By: David E. Hale
David E. Hale, Manager
And not individually

ACKNOWLEDGEMENT

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

On this 11 day of March 2005, before me, the undersigned Notary Public, personally appeared David E. Hale, Manager as aforesaid, and proved to me through satisfactory evidence of identification, which was Massachusetts Driver License to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose as a duly authorized member of Woodlands at Laurel Hill, LLC.



ANDREA H. RISTINE
Notary Public
Commonwealth of Massachusetts
My Commission Expires
February 27, 2009

Andrea H. Ristine
(official signature and seal of notary)

My commission expires 2/27/09

TOWN OF ACTON, MASSACHUSETTS,

By its Board of Selectmen,

F. Dore' Hunter, Chairman

Peter K. Ashton

William H. Shupert, III

Walter M. Foster

Robert A. Johnson

TOWN ACKNOWLEDGEMENT

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

On this ____ day of _____, 2005, before me, the undersigned Notary Public, personally appeared each of the foregoing named members of the Board of Selectmen of the Town of Acton, proved to me through satisfactory evidence of identification, which was: examination of _____, to be the person whose name is signed on the preceding document, and acknowledged to me that he/she signed it voluntarily for its stated purpose as the foregoing named members of the Board of Selectmen of the Town of Acton, a municipal corporation.

_____(official signature and seal of notary)

My commission expires _____

memo of agreement-4A